Office - Supreme Court, U.S.
FILED
SEP 21 1984
STEVAS
CLERK

No. 84-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF ILLINOIS and SENTRY FOOD STORES, INC.,
Petitioners,

v.

ASSOCIATED MILK PRODUCERS, INC., ASSOCIATED MILK DEALERS, INC., ASSOCIATED RESERVE STANDBY POOL COOPERATIVE, CENTRAL MILK PRODUCERS COOPERATIVE and CENTRAL MILK SALES AGENCY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPPOSITION OF ASSOCIATED MILK PRODUCERS, INC., ASSOCIATED MILK DEALERS, INC., CENTRAL MILK PRODUCERS COOPERATIVE and CENTRAL MILK SALES AGENCY TO PETITION FOR WRIT OF CERTIORARI

SYDNEY BERDE
Counsel of Record
RICHARD M. HAGSTROM
BERDE & HAGSTROM, P.A.
Suite 2602
American National Bank Bldg.
St. Paul, MN 55101
(612) 291-8106
Counsel for Associated Milk Producers, Inc., Central Milk Producers Cooperative and Central Milk Sales Agency

RICHARD K. DECKER
Counsel of Record
MICHAEL P. COMISKEY
LORD, BISSELL & BROOK
115 S. LaSalle Street
Suite 3500
Chicago, IL 60603
(312) 443-0427
Counsel for Associated Milk Dealers, Inc.

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

BEST AVAILABLE COPY

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether an antitrust plaintiff whose damage claim is based on the pass-on of an alleged illegal overcharge may avoid the indirect purchaser bar of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) by the mere allegation of a vertical price fixing conspiracy between the remote suppliers of the price fixed product and their unnamed direct purchasers.

2. Whether petitioners' failure to identify or move for joinder of "persons needed for just adjudication" bars petitioner from raising for the first time in this Court the question of the applicability of Rule 19(b) Fed. R. Civ. P. to this case where:

(a) the identities of such persons were known to petitioners;

(b) such persons were at all times subject to service of process; and

(c) joinder of such persons would not deprive the district court of subject matter jurisdiction.

TABLE OF CONTENTS

	Page
Counterstatement of the Questions Presented	i
Table of Authorities	iv
Opinions Below	2
Statement of the Case	2
Reasons for Denying the Writ	5
I. Sentry's Petition Is Out Of Time	5
II. Petitioners' Claims For Passed-On Overcharge Damages Are Barred By The Indirect Purchaser Rule Of *Illinois Brick*	6
A. A Vertical Conspiracy Exception Is Not Available In This Case Because Petitioners Did Not Purchase Processed Fluid Milk Products Directly From An Alleged Co-Conspirator	8
B. A Vertical Conspiracy Exception Is Not Available In This Case Because Petitioners Failed To Join The Middlemen	9
III. The Eighth Circuit's Decision Is Not In Conflict With The Decisions Of Either The Seventh Or Ninth Circuits	13
IV. The Petition Fails To Raise An Issue Under Fed. R. Civ. P. 19 Warranting Review	15
Conclusion	16

TABLE OF AUTHORITIES

Page

Cases:

Fontana Aviation, Inc. v. Cessna Aircraft Co., 617 F.2d 478 (7th Cir. 1980) 14, 15

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 3, 6, 10

Hill v. Chicago & Evanston R.R. Co., 140 U.S. 52 (1891) 5, 6

I.C.C. v. Blue Diamond Products Co., 93 F. Supp. 688 (D. Iowa 1950) 12

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) ..... *passim*

In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979), *cert. denied sub nom.* Safeway Stores, Inc. v. Meat Price Investigators Association, 449 U.S. 905 (1980) 10, 14

In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation, 691 F.2d 1335 (9th Cir. 1982), *cert. denied sub nom.* California v. Standard Oil Co., 104 S.Ct. 972 (1984) 10, 13, 14

In re Mid-Atlantic Toyota Antitrust Litigation, 516 F. Supp. 1287 (D. Md. 1981) 8

In re Midwest Milk Monopolization Litigation, 379 F. Supp. 989 (J.P.M.L. 1974) 11

In re Midwest Milk Monopolization Litigation, 529 F. Supp. 1326 (W.D. Mo. 1982) 2, 3, 4, 7, 8, 9, 11, 12

Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968) 15

Page

Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323 (9th Cir. 1980) 13

State of Illinois v. Associated Milk Producers, Inc., 730 F.2d 528 (8th Cir. 1984) 4, 7, 9, 11, 13, 14, 15

Stevens v. Loomis, 334 F.2d 775 (1st Cir. 1964) 12

Technical Learning Collective, Inc. v. Daimler-Benz Aktiengesellschaft, 1980-81 Trade Cas. ¶63,612 (D. Md. 1980) 10

Whitsitt v. Union Depot & R.R. Co., 122 U.S. 363 (1877) 6

William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc., 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982) 13, 15

Statutes:

Section 4 of the Clayton Act, 15 U.S.C. §15 3

Rules:

Fed. R. Civ. P. 19 ..... i, 7, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 84-271

STATE OF ILLINOIS and SENTRY FOOD STORES, INC.,
Petitioners,

v.

ASSOCIATED MILK PRODUCERS, INC., ASSOCIATED MILK DEALERS, INC., ASSOCIATED RESERVE STANDBY POOL COOPERATIVE, CENTRAL MILK PRODUCERS COOPERATIVE and CENTRAL MILK SALES AGENCY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPPOSITION OF ASSOCIATED MILK PRODUCERS, INC., ASSOCIATED MILK DEALERS, INC., CENTRAL MILK PRODUCERS COOPERATIVE and CENTRAL MILK SALES AGENCY TO PETITION FOR WRIT OF CERTIORARI

Respondents Associated Milk Producers, Inc. (AMPI), Associated Milk Dealers, Inc. (AMDI), Central Milk Producers Cooperative (CMPC) and Central Milk Sales Agency (CMSA)[1] respectfully submit this joint brief in opposition

[1] AMPI, AMDI, CMPC and CMSA have no parent, subsidiary or affiliated companies within the meaning of Rule 28.1.

BEST AVAILABLE COPY

to a Petition for Writ of Certiorari ("Pet.") filed by the State of Illinois ("State") and Sentry Food Stores, Inc. ("Sentry"), Docket No. 84-271, to review the decision of the United States Court of Appeals for the Eighth Circuit which affirmed the district court's partial summary judgment dismissing the petitioners' Sherman Act Section 1 and 2 damage claims.

OPINIONS BELOW

The opinion of the Court of Appeals filed on March 20, 1984 is reported in the advance sheets at 730 F.2d 528. The opinion was revised on May 18, 1984 and appears in the Appendix to the Petition for Writ of Certiorari (hereinafter "App.") at App. 1a. The revised opinion has not yet been published, but will appear in bound volume 730 of the Federal Reporter, Second Series.

The opinion of the United States District Court for the Western District of Missouri, reported at 529 F. Supp. 1326, appears at App. 12a.

STATEMENT OF THE CASE

In March and April, 1972 petitioners State and Sentry, respectively, filed their complaints in the United States District Court for the Northern District of Illinois naming as defendants each of the respondents herein. Petitioners alleged that respondents had conspired to unlawfully fix the price of raw milk and that the overcharge was passed on to petitioners in the form of higher prices for processed fluid milk products. *In re Midwest Milk Monopolization Litigation*, 529 F. Supp. 1326, 1329 at ¶3, 1333 at ¶6 (W.D. Mo. 1982) (hereinafter *Midwest Milk*), App. 16a, 26a.

In February, 1973 respondents filed their joint motion to dismiss petitioners' complaints on the grounds that the State and Sentry, as purchasers of *processed* milk products from persons other than respondents, lacked standing to sue for the alleged unlawful price enhancement of the alleged relevant product market—raw milk. The parties entered into lengthy and detailed stipulations of fact with respect to the motion. *Id.* at 1328, 1333, App. 15a, 25a.

On March 21, 1977, Judge Oliver heard argument on respondents' motion to dismiss petitioners' complaints. Respondents contended that the logical application of the rule enunciated in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) (hereinafter *Hanover Shoe*) which barred use of the "pass on" defense, precluded the offensive use of "pass on" by a plaintiff as the basis for claiming antitrust injury. Respondents' motion was denied on March 28, 1977.

On June 9, 1977 this Court rendered its decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (hereinafter *Illinois Brick*) barring the offensive use of "pass on" and limiting the category of persons injured in their business or property under §4 of the Clayton Act, 15 U.S.C. §15, to those who directly purchased the price fixed product, which in this case is alleged to be raw milk. *Midwest Milk*, 529 F. Supp. at 1329 ¶3, 1333 ¶4, App. 16a, 25a. Upon the basis of *Illinois Brick*, respondents on July 21, 1977 moved for reconsideration of Judge Oliver's March 28, 1977 *Order*.

On February 2, 1981 while respondents' motion for reconsideration still pended before him, Judge Oliver entered an order directing all parties to show cause why this case and others should not be remanded to the Northern District of Illinois pursuant to Rule 11(c)(ii), R.P.J.P.M.L. Respondents

opposed remand and requested the court to rule respondents' motion for reconsideration.

Pursuant to Judge Oliver's March 31, 1981 order directing further proceedings with respect to the *Illinois Brick* issue, respondents filed their *Motion For Partial Summary Judgment* seeking dismissal of petitioners' treble damage claims upon the grounds that petitioners, as indirect purchasers of processed fluid milk were barred, as a matter of law, under *Illinois Brick* from recovering treble damages arising from respondents' alleged enhancement of the price of raw milk. Based solely upon the stipulated facts, the pleadings, an uncontroverted affidavit, the applicable law and the absence of any genuine issues of material fact, the district court dismissed petitioners' §4 Clayton Act claims. *Midwest Milk*, 529 F. Supp. at 1328, 13a-14a.

Thereafter, the district court denied the State and Sentry's motions for reconsideration, the petitioners stipulated to dismissal of their claims for injunctive relief, and the district court entered its Final Orders and Judgments with respect to all of petitioners' claims. The State and Sentry appealed. The two appeals were consolidated for briefing and submission to the Eighth Circuit Court of Appeals.

On appeal, the Eighth Circuit affirmed the judgment of the district court holding that the "claims of Sentry and the State present a classic *Illinois Brick* situation." *State of Illinois v. Associated Milk Producers, Inc.*, 730 F.2d 528, 533 (8th Cir. 1984) (hereinafter "*State of Illinois*"), App. 10a. The Eighth Circuit declined to reach petitioners' argument that since "ordinary market forces were superceded (sic) at the level of the dealers and all supra-competitive charges for raw milk were passed on" directly to petitioners, they should be permitted to sue as direct purchasers from co-conspirators of

defendants, *id.* at 529, App. 3a, because petitioners' failure to join as defendants the alleged co-conspirator dealers would subject respondents to potential multiple liability. *Id.* at 532, App. 8a-9a.

REASONS FOR DENYING THE WRIT

I. SENTRY'S PETITION IS OUT OF TIME.

Supreme Court Rule 20.2 requires that a petition for writ of certiorari must be filed within the time prescribed by 28 U.S.C. §2101(c), which provides in pertinent part:

> [A]ny writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.

The judgment for the Court of Appeals for the Eighth Circuit from which the Petition is brought was entered on March 20, 1984 in case numbers 82-2162 (State) and 82-2163 (Sentry). App. 48a. While the State filed a timely petition for rehearing, which stays the running of the ninety day period, Supreme Court Rule 20.4, Sentry did not file such a petition. On May 18, 1984 the Eighth Circuit denied the State's petition for rehearing. App. 49a. The Petition for Writ of Certiorari was filed on August 16, 1984, ninety days after the State's petition for rehearing was denied. While the Petition was timely as to the State, Sentry's filing deadline was ninety days after March 20, 1984 or June 18, 1984. Therefore, Sentry's Petition for Writ of Certiorari to review the Eighth Circuit's affirmance of the dismissal of Sentry's complaint in case number 82-2163 is jurisdictionally out of time and should be dismissed. *Hill v. Chicago & Evanston R.R. Co.*, 140 U.S.

52 (1891); *Whitsitt v. Union Depot & R.R. Co.*, 122 U.S. 363 (1877).

II. PETITIONERS' CLAIMS FOR PASSED-ON OVERCHARGE DAMAGES ARE BARRED BY THE INDIRECT PURCHASER RULE OF *ILLINOIS BRICK*.

In *Illinois Brick* this Court held that indirect purchasers in a chain of distribution were precluded from bringing a damage action based on overcharges passed on to them by the direct purchasers from an antitrust violator. 431 U.S. at 746. The rationale for the *Illinois Brick* rule, in addition to being logically compelled by this Court's earlier decision in *Hanover Shoe* rejecting the defensive use of pass-on, was three-fold. First, this Court stated that if persons at each level of the distribution chain of a price-fixed product could sue the antitrust violator for the passed-on overcharge, multiple liability for defendants and inconsistent adjudications could result. 431 U.S. at 730-31. Second, allowing proof of passed-on overcharges at each level of the distribution chain would present insuperable difficulties of proof in tracing the overcharge through the distribution chain and mire the courts in unacceptable "evidentiary complexities and uncertainties." *Id.* at 731-33. Third, "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchaser." *Id.* at 735.

While conceding that if market forces are not superseded at each level of the distribution chain between the antitrust violator and the indirect purchaser, "proof of passing-on would not be allowed," Pet. at 6, petitioners argue that in this case, the *Illinois Brick* bar to proof of pass-on has no application since market forces were superseded by an alleged conspiracy between respondents and the middlemen milk

dealers. The issue presented by petitioners is: "Where proof of passing-on is allowed because market forces have been superseded at the level of the middleman, is the middleman an indispensable party under Federal Rule of Civil Procedure 19(b)?" Pet. at 6. This begs the question. Petitioners assume market forces were superseded and that the *Illinois Brick* rule may be circumvented by the mere allegation of a vertical conspiracy between the alleged antitrust violator and its customer. As will be shown, petitioners' assumptions are wrong.

The Court in *Illinois Brick* recognized only two situations in which market forces are superseded permitting an indirect purchaser to sue for damages resulting from a passed-on overcharge. First, market forces are superseded if there is a pre-existing, fixed quantity, cost-plus contract at each level of the distribution chain. 431 U.S. at 736. However, this exception has no application to this case since, as the Eighth Circuit stated, "it is agreed that neither Sentry nor the State had a pre-existing, fixed quantity, cost-plus contract." *State of Illinois*, 730 F.2d at 533, App. 10a.

The second "situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer." *Illinois Brick*, 431 U.S. at 736, n. 16. Again, this exception has no application to this case since the parties stipulated that defendant cooperatives have never exercised any control over the middleman-dealers. *Midwest Milk*, 529 F. Supp. at 1330, ¶17 and at 1334-35, ¶17, App. 18a, 28a.

Petitioners argued below that the lower courts have recognized a third "exception", namely, a vertical conspiracy ex-

ception to the rule of *Illinois Brick*.[2] This exception is claimed to arise when the middlemen are co-conspirators of the illegal price-fixers and the indirect purchaser purchases directly from the co-conspirator. However, even if there were a vertical conspiracy exception to the *Illinois Brick* rule barring suits by indirect purchasers, petitioners' claims fail the prerequisites of that exception because: (1) petitioners did not purchase from an alleged co-conspirator; and (2) petitioners failed to join the middlemen as parties defendant.[3]

A. A Vertical Conspiracy Exception Is Not Available In This Case Because Petitioners Did Not Purchase Processed Fluid Milk Products Directly From An Alleged Co-Conspirator.

The State and Sentry claim they "bought directly from [milk] dealers who were identified as members of the conspiracy." Pet. at 4. Yet, it is stipulated fact that these dealers were never identified and neither the State nor Sentry purchased processed fluid milk products directly from any milk dealer. The Eighth Circuit stated: "The State of Illinois purchased its milk products on the basis of bids from unnamed dealers or vendors; Sentry purchased its milk products

---

[2] When faced with respondents' *Illinois Brick* motion in the district court, petitioners sought unsuccessfully to shift theories from the horizontal conspiracy alleged in the complaints to a vertical conspiracy. *Midwest Milk*, 529 F. Supp. at 1339-41, App. 39a-43a. While the Eighth Circuit acknowledged the shift in theory, App. 3a, it found it unnecessary to address the change of theory issue on appeal.

[3] Furthermore, if as one court has suggested, the vertical conspiracy "exception" arises from the control exception, *see In re Mid-Atlantic Toyota Antitrust Litigation*, 516 F. Supp. 1287, 1292-96 (D. Md. 1981), the vertical conspiracy exception is not available to petitioners since they have stipulated the control exception has no application to the facts of this case.

through a master vendor (McMahon), who purchased through Dean Foods Company, and these purchases were billed to Sentry by Centrella (a buying cooperative of which Sentry is a member)." *State of Illinois*, 730 F.2d at 530, App. 4a.[4] Since the "competitive bidding process . . . can hardly be said to circumvent complex market interactions," *Illinois Brick*, 431 U.S. at 736, the State's underlying assumption that market forces were superseded in its purchases of processed fluid milk is simply incorrect. Similarly, Sentry's claim that market forces were superseded fails since it never alleged that its direct sellers, Centrella and McMahon, were part of the alleged conspiracy.

B. A Vertical Conspiracy Exception Is Not Available In This Case Because Petitioners Failed To Join The Middlemen.

While this Court did not recognize a vertical conspiracy "exception" in *Illinois Brick*, the rationale underlying the decision mandates that if indirect purchasers are permitted to sue for overcharges passed on by conspiring middlemen through a vertical distribution chain, joinder of the intermediate "conspiring" direct sellers would be necessary to avoid the risk of multiple liability for defendants. In rejecting an argument to permit the offensive use of pass-on if all parties in the distribution chain could be joined, this Court stated:

> These procedural devices cannot protect against multiple liability where the direct purchasers have already re-

---

[4] The facts which are the basis for the Eighth Circuit's statement were the subject of a stipulation, which was quoted by the district court. *See Midwest Milk*, 529 F. Supp. at 1330, ¶ 16, 1335-36, ¶¶ 25-28, 36-41, App. 18a, 29a, 31a.

> covered by obtaining a judgment or by settling, as is more likely. . . .
>
> Moreover, even if ways could be found to bring all potential plaintiffs together in one huge action, the complexity thereby introduced into treble-damages proceedings argues strongly for retaining the *Hanover-Shoe* rule. 431 U.S. at 731, n. 11.

See also Illinois Brick at 740-41.

The Ninth, the Fifth, and most recently, the Eighth Circuit in this case have interpreted this Court's discussion of multiple liability to require joinder of intermediate sellers if a vertical conspiracy exception is alleged. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1342 (9th Cir. 1982), *cert. denied sub nom. California v. Standard Oil Company*, 104 S.Ct. 972 (1984) (hereinafter *Petroleum Products*); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163 (5th Cir. 1979), *cert. denied sub nom. Safeway Stores, Inc. v. Meat Price Investigators Association*, 449 U.S. 905 (1980) (hereinafter *In re Beef*); *see also Technical Learning Collective, Inc. v. Daimler-Benz Aktiengesellschaft*, 1980-81 Trade Cas. ¶63,612 (D. Md. 1980). The rationale for the joinder requirement was articulated by the Fifth Circuit in *In re Beef*:

> Absent joinder of the packers and slaughterhouses, the rule forbidding one antitrust conspirator from maintaining an action against another for damages arising from the joint activity would not protect these defendants from the risk of overlapping liability. The retail chains could not, in a suit brought by the packers, use a judgment or finding of vertical conspiracy in the instant case to prevent the packers from successfully asserting in their own lawsuit that they did not in fact conspire with the chains

and are therefore not barred by the co-conspirator doctrine from recovering damages from the retail chains. *E.g., Mosher Steel Corp. v. N.L.R.B.*, 5 Cir. 1978, 568 F.2d 436. Because the packers are not parties to this suit, the possibility of inconsistent adjudications on the issue of the existence of a vertical conspiracy leaves the defendants subject to the risk of multiple liability that the *Illinois Brick* Court found unacceptable. 600 F.2d at 1163.

As recognized by the Eighth Circuit and the district court, the danger of multiple liability to these defendants is not illusory but real since Certified Grocers of Illinois, Sentry's supply source from April 1, 1946 until September 12, 1969, App. 29a, and Oberweis Dairy, Inc., a principal supplier of processed fluid milk to the State and its political subdivisions, have both sued these respondents for the same alleged overcharges arising out of the same transactions. *State of Illinois*, 730 F.2d at 532, App. 8a; *Midwest Milk*, 529 F. Supp. at 1340, App. 40a. Not only did intermediate milk dealers sue respondents but intermediate milk vendors brought class actions against these same respondents.[5] It was from some of these

---

[5] Several groups of milk vendors who purchased processed milk products from processor-members of AMDI for resale to the State institutions, retailers and consumers in the Chicago area sued these respondents for the same alleged unlawful overcharges for which the State and Sentry sued. *Augle, et al. v. Associated Milk Producers, Inc., et al.*, 74-C-371 (N.D. Ill. 1974); *Hughes, et al. v. Associated Milk Producers, Inc., et al.*, 76-C-1652 (N.D. Ill. 1976); *Salehar, et al. v. Associated Milk Producers, Inc., et al.*, 76-C-1606 (N.D. Ill. 1976); *Genesis Group, Inc., et al. v. Associated Milk Producers, Inc., et al.*, 72-C-934 (N.D. Ill. 1972). Each of these cases was transferred to the United States District Court for the Western District of Missouri along with the State's and Sentry's claims. *See In re Midwest Milk Monopolization Litigation*, 379 F. Supp. 989, 991 (J.P.M.L. 1974).

same milk vendors that the State purchased its processed fluid milk products pursuant to the competitive bidding process. *Midwest Milk*, 529 F. Supp. at 1330, ¶16, App. 18a. Clearly, the Eighth Circuit's decision, rather than "shield-[ing] the defendants from *any* liability," Pet. at 9 (emphasis in original), followed this Court's *Illinois Brick* mandate in avoiding inconsistent adjudications and multiple liability for respondents.

Petitioners' arguments that it was respondents' duty to join the middlemen and there is no need for joinder because the statute of limitations has run, Pet. at 8, are without merit.

In *Illinois Brick* this Court stated that the "plaintiff bringing the treble-damages action would be required, under Fed. Rule Civ. Proc. 19(c), to 'state the names, if known', of these absent potential claimants. . . ." 431 U.S. at 739. Petitioners' failure to identify "potential claimants" justifies dismissal of their claims. *See Stevens v. Loomis*, 334 F.2d 775 (1st Cir. 1964); *see also I.C.C. v. Blue Diamond Products Co.*, 93 F. Supp. 688, 689 (D. Iowa 1950).

Since petitioners claim that respondents have engaged in a continuing illegal conspiracy, the statute of limitations would not bar the claims of middlemen. Furthermore, unless the middlemen were made parties to this action, any determination in this proceeding that the middlemen's claims were barred by the statute of limitations would not be binding on them in subsequent suits by the middlemen against the respondents. Most importantly, the statute of limitations did not run on Oberweis Dairy, Inc., Certified Grocers of Illinois, Inc. and the other middlemen-vendors which brought suit against these same respondents. This Court unequivocally rejected as "unacceptable" even the possibility of imposing "on the shoulders of [alleged] wrongdoers" the risk of mul-

tiple liability, 431 U.S. at 731, n.11, and it refused to "countenance *ad hoc* case-by-case exceptions to a rule of intended general application." *Petroleum Products,* 691 F.2d at 1342, citing *Illinois Brick,* 431 U.S. at 744.

III. THE EIGHTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF EITHER THE SEVENTH OR NINTH CIRCUITS.

Petitioners argue that the Eighth Circuit's decision conflicts with the decisions of the Ninth and Seventh Circuits. Pet. at 6-7. As will be shown, no conflict exists among the circuits that have considered the question of joinder of middlemen when a vertical conspiracy is alleged.

Contrary to petitioners' assertion that the Eighth Circuit noted "a conflict *with* the Ninth Circuit," Pet. at 6 (emphasis added), the Eighth Circuit noted a possible conflict *within* the Ninth Circuit. *State of Illinois,* 730 F.2d at 531, App. 6a. According to petitioners, this conflict arises in the Ninth Circuit's decisions in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.,* 668 F.2d 1014 (9th Cir. 1981), *cert. denied,* 459 U.S. 825 (1982); *Royal Printing Co. v. Kimberly-Clark Corp.,* 621 F.2d 323, 326 (9th Cir. 1980); and *Petroleum Products.*

While the Ninth Circuit in *Inglis* held "that joinder of a co-conspirator was not necessary," Pet. at 6, it did so in the context of one competitor suing another. There was no claim of passed-on overcharges resulting in a possibility of multiple liability and complex proof nor was there any discussion of *Illinois Brick.* Under these circumstances, the *Inglis* decision cannot be said to conflict with the Eighth Circuit's decision in this case.

Petitioners similarly misread *Royal Printing* when they claim the Ninth Circuit "allowed antitrust plaintiffs to pro-

ceed without joinder of middlemen where the potential for multiple liability was remote." Pet. at 6-7. The Ninth Circuit, in reliance upon the control exception cited by this Court in *Illinois Brick*, 431 U.S. at 736, n.16, simply held "that *Illinois Brick* does not bar an indirect purchaser's suit where the direct purchaser is a division or subsidiary of a co-conspirator." 621 F.2d at 326. That is not this case.[6]

The final Ninth Circuit decision cited by petitioners, *Petroleum Products*, is not in conflict with the Eighth Circuit's decision, but rather, was relied upon by the Eighth Circuit in reaching its decision that joinder of the middlemen is required to avoid the risk of multiple liability when a vertical conspiracy exception to *Illinois Brick* is alleged. *State of Illinois*, 730 F.2d at 531, App. 6a. Rather than holding that "although joinder was necessary, dismissal was inappropriate" as petitioners suggest, Pet. at 7, the Ninth Circuit, citing *In re Beef*, upheld "the ruling of the district court that if a proper vertical conspiracy claim is alleged, joinder of [middlemen] retail dealers is required to prevent a serious risk of multiple liability." 691 F.2d at 1342. Absent joinder, the claims could not be pursued. Clearly, rather than being in conflict with the Eighth Circuit's decision, the Ninth Circuit follows the mandatory joinder rule first enunciated by the Fifth Circuit in *In re Beef*. 600 F.2d at 1163.

The alleged conflict with the Seventh Circuit's decision in *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980) is similarly illusory. Pet. at 7. In *Fontana Aviation* the Seventh Circuit factually distinguished that case from *Illinois Brick*. Fontana claimed

---

[6] Petitioners stipulated that the control exception is not applicable to this case.

> to be a competitor, not a customer of Cessna. . . . Fontana does not seek damages for an illegal indirect overcharge passed on to it as is prohibited by *Illinois Brick*, but sues on the basis of a combination of acts allegedly causing competitive injury which destroyed its avionics business. 617 F.2d at 481.

Thus, *Fontana*, and *William Inglis & Sons*, unlike the State and Sentry, were not indirect purchasers of an allegedly price fixed product, but were competitors of their respective defendants suing for competitive injury. As such, neither case presents a conflict with the Eighth Circuit's opinion.

IV. THE PETITION FAILS TO RAISE AN ISSUE UNDER FED. R. CIV. P. 19 WARRANTING REVIEW.

Petitioners contend that the Eighth Circuit's decision "is in direct conflict with this Court's decision in *Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), relating to joinder of necessary parties under Federal Rule of Civil Procedure 19." Pet. at 7. The argument, made here for the first time, is that the Eighth Circuit erred in affirming the district court's dismissal without first applying the equitable criteria of Rule 19(b). Pet. at 8.

The argument is devoid of merit. The alleged co-conspirator "Chicago milk dealers", Pet. at 3, were all known to petitioners and were subject to service of process in the Northern District of Illinois where the case was filed. Petitioners neither named, nor moved to join them, nor did petitioners "state the reasons they [were] not joined" as required by Rule 19(c). *State of Illinois*, 730 F.2d at 532; App. 9a. Since Rule 19(b) applies only "[if] a person as described in [Rule 19] subdivision (a)(1)-(2) . . . cannot be made a party . . .", there was no basis

for the district court to invoke the Rule nor for the Eighth Circuit to consider it.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

SYDNEY BERDE*
RICHARD M. HAGSTROM
BERDE & HAGSTROM, P.A.
Suite 2602
American National Bank Bldg.
St. Paul, Minnesota 55101
(612) 291-8106

RICHARD K. DECKER*
MICHAEL P. COMISKEY
LORD, BISSELL & BROOK
115 S. LaSalle Street
Suite 3500
Chicago, Illinois 60603
(313) 443-0427
Counsel for Respondents

* Counsel of Record